

HOUSE ENERGY AND NATURAL RESOURCES COMMITTEE SUBSTITUTE FOR
HOUSE BILL 48

48TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2007

AN ACT

RELATING TO REAL PROPERTY; ENACTING THE UNIFORM ENVIRONMENTAL
COVENANTS ACT; PROVIDING FOR COVENANTS RESTRICTING USE OF REAL
PROPERTY SUBJECT TO ENVIRONMENTAL REMEDIATION; PROVIDING
PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the
"Uniform Environmental Covenants Act".

Section 2. DEFINITIONS.--As used in the Uniform
Environmental Covenants Act:

A. "activity and land use limitations" means
restrictions or obligations created pursuant to the Uniform
Environmental Covenants Act with respect to real property;

B. "agency" means the department of environment or
any other state or federal agency that determines or approves

.167431.1

underscored material = new
[bracketed material] = delete

1 the environmental response project pursuant to which the
2 environmental covenant is created;

3 C. "common interest community" means a condominium,
4 cooperative or other real property with respect to which a
5 person, by virtue of the person's ownership of a parcel of real
6 property, is obligated to pay property taxes or insurance
7 premiums or for maintenance or improvement of other real
8 property described in a recorded covenant that creates the
9 common interest community;

10 D. "environmental covenant" means a servitude
11 arising under an environmental response project that imposes
12 activity and land use limitations, but does not include any
13 covenant or servitude that restricts the withdrawal or use of
14 ground water;

15 E. "environmental response project" means a plan or
16 work performed for environmental remediation of real property
17 and conducted:

18 (1) under a federal or state program governing
19 environmental remediation of real property;

20 (2) incident to closure of a solid or
21 hazardous waste management unit, if the closure is conducted
22 with approval of an agency; or

23 (3) under a state voluntary cleanup program
24 authorized in the Voluntary Remediation Act;

25 F. "holder" means the grantee of an environmental

.167431.1

1 covenant as specified in Subsection A of Section 3 of the
2 Uniform Environmental Covenants Act;

3 G. "person" means an individual; corporation;
4 business trust; estate; trust; partnership; limited liability
5 company; association; joint venture; public corporation;
6 government; governmental subdivision, agency or
7 instrumentality; or any other legal or commercial entity;

8 H. "record", when used as a noun, means information
9 that is inscribed on a tangible medium or that is stored in an
10 electronic or other medium and is retrievable in perceivable
11 form; and

12 I. "state" means a state of the United States, the
13 District of Columbia, Puerto Rico, the United States Virgin
14 Islands or any territory or insular possession subject to the
15 jurisdiction of the United States.

16 Section 3. NATURE OF RIGHTS--SUBORDINATION OF
17 INTERESTS.--

18 A. Any person, including a person who owns an
19 interest in real property, an agency or a municipality or other
20 unit of local government, may be a holder. An environmental
21 covenant may identify more than one holder. The interest of a
22 holder is an interest in real property.

23 B. A right of an agency pursuant to the Uniform
24 Environmental Covenants Act or pursuant to an environmental
25 covenant, other than a right as a holder, is not an interest in

.167431.1

underscoring material = new
[bracketed material] = delete

1 real property.

2 C. An agency is bound by any obligation it assumes
3 in an environmental covenant, but an agency does not assume
4 obligations merely by signing an environmental covenant. Any
5 other person who signs an environmental covenant is bound by
6 the obligations the person assumes in the environmental
7 covenant, but signing the environmental covenant does not
8 change obligations, rights or protections granted or imposed
9 under law other than the Uniform Environmental Covenants Act,
10 except as provided in the environmental covenant.

11 D. The following rules apply to interests in real
12 property in existence at the time an environmental covenant is
13 created or amended:

14 (1) an interest that has priority under other
15 law is not affected by an environmental covenant unless the
16 person that owns the interest subordinates that interest to the
17 environmental covenant;

18 (2) the Uniform Environmental Covenants Act
19 does not require a person who owns a prior interest to
20 subordinate that interest to an environmental covenant or to
21 agree to be bound by the environmental covenant;

22 (3) a subordination agreement may be contained
23 in an environmental covenant covering real property or in a
24 separate record. If the environmental covenant covers commonly
25 owned property in a common interest community, the record may

.167431.1

1 be signed by any person authorized by the governing board of
2 the owners' association; and

3 (4) an agreement by a person to subordinate a
4 prior interest to an environmental covenant affects the
5 priority of that person's interest but does not by itself
6 impose any affirmative obligation on the person with respect to
7 the environmental covenant.

8 Section 4. CONTENTS OF ENVIRONMENTAL COVENANT.--

9 A. An environmental covenant shall:

10 (1) state that the instrument is an
11 environmental covenant executed pursuant to the Uniform
12 Environmental Covenants Act;

13 (2) contain a legally sufficient description
14 of the real property subject to the environmental covenant;

15 (3) describe the activity and land use
16 limitations on the real property;

17 (4) identify every holder;

18 (5) be signed by every holder and, unless
19 waived by the agency, every owner of the fee simple of the real
20 property subject to the environmental covenant;

21 (6) be approved and signed by the agency in
22 its discretion;

23 (7) if the agency is not a state agency, be
24 approved and signed by the department of environment in its
25 discretion;

.167431.1

1 (8) indicate whether ground water is
2 contaminated;

3 (9) describe the former activity that caused
4 contamination and whether residual contamination, including
5 contamination of ground water, may still be present that could
6 be harmful to human health and the environment;

7 (10) contain, if the environmental covenant
8 prohibits the unrestricted use of the real property, the
9 possible penalties and the notice and right of rescission
10 requirements provided in Section 8 of the Uniform Environmental
11 Covenants Act;

12 (11) contain requirements for periodic
13 reporting to the agency that describe compliance with the
14 environmental covenant; and

15 (12) identify the name and location of any
16 administrative record for the environmental response project
17 reflected in the environmental covenant.

18 B. In addition to the information required by
19 Subsection A of this section, an environmental covenant may
20 contain other information, restrictions and requirements
21 required by the agency, including:

22 (1) requirements for notice following transfer
23 of a specified interest in, or concerning proposed changes in
24 use of, applications for building permits or proposals for any
25 site work affecting the contamination on the property subject

.167431.1

1 to the environmental covenant;

2 (2) rights of access to the property granted
3 in connection with implementation or enforcement of the
4 environmental covenant;

5 (3) a brief narrative description of the
6 contamination and remedy, including the contaminants of
7 concern, the pathways of exposure, limits on exposure and the
8 location and extent of the contamination;

9 (4) limitation on amendment or termination of
10 the environmental covenant in addition to those contained in
11 Sections 10 and 11 of the Uniform Environmental Covenants Act;
12 and

13 (5) rights of the holder in addition to the
14 holder's right to enforce the environmental covenant pursuant
15 to Section 12 of the Uniform Environmental Covenants Act.

16 C. In addition to other conditions for the agency's
17 approval of an environmental covenant, the agency may require
18 those persons specified by the agency who have interests in the
19 real property to sign the environmental covenant.

20 Section 5. VALIDITY--EFFECT ON OTHER INSTRUMENTS.--

21 A. An environmental covenant that complies with the
22 Uniform Environmental Covenants Act runs with the land.

23 B. An environmental covenant that is otherwise
24 effective is valid and enforceable even if:

25 (1) it is not appurtenant to an interest in

.167431.1

1 real property;

2 (2) it can be or has been assigned to a person
3 other than the original holder;

4 (3) it is not of a character that has been
5 recognized traditionally in common law;

6 (4) it imposes a negative burden;

7 (5) it imposes an affirmative obligation on a
8 person having an interest in the real property or on the
9 holder;

10 (6) the benefit or burden does not touch or
11 concern real property;

12 (7) there is no privity of estate or contract;

13 (8) the holder dies, ceases to exist, resigns
14 or is replaced; or

15 (9) the owner of an interest subject to the
16 environmental covenant and the holder are the same person.

17 C. An instrument that creates restrictions or
18 obligations with respect to real property that would qualify as
19 activity and land use limitations, except for the fact that the
20 instrument was recorded before the effective date of the
21 Uniform Environmental Covenants Act, is not invalid or
22 unenforceable because of any of the limitations on enforcement
23 of interests described in Subsection B of this section or
24 because it was identified as an easement, servitude, deed
25 restriction or other interest. The Uniform Environmental

.167431.1

1 Covenants Act does not apply in any other respect to such an
2 instrument.

3 D. The Uniform Environmental Covenants Act does not
4 invalidate or render unenforceable any interest, whether
5 designated as an environmental covenant or other interest, that
6 is otherwise enforceable under the law of New Mexico.

7 Section 6. RELATIONSHIP TO OTHER LAW.--

8 A. The Uniform Environmental Covenants Act does not
9 authorize a use of real property that is otherwise prohibited
10 by zoning, by a law other than the Uniform Environmental
11 Covenants Act regulating use of real property or by a recorded
12 instrument that has priority over the environmental covenant.
13 An environmental covenant may prohibit or restrict a use of
14 real property that is authorized by zoning or by a law other
15 than the Uniform Environmental Covenants Act.

16 B. For the purpose of preserving and protecting
17 water resources and notwithstanding any provision of the
18 Uniform Environmental Covenants Act, the county or municipal
19 zoning authority may require water use limitations and water
20 quality protections pursuant to Section 3-21-1 NMSA 1978.

21 C. A person shall not submit an environmental
22 covenant as evidence supporting the approval of an alternative
23 abatement standard for ground water at a hearing held pursuant
24 to the Water Quality Act.

25 D. The Uniform Environmental Covenants Act

.167431.1

1 supplements and does not displace the Voluntary Remediation
2 Act, the New Mexico Mining Act, the Surface Mining Act, the Oil
3 and Gas Act, the Water Quality Act or any other law governing
4 an environmental response project.

5 Section 7. NOTICE.--

6 A. A copy of an environmental covenant shall be
7 provided by the holder to the following persons and in the
8 manner required by the agency:

9 (1) each person who signed the environmental
10 covenant;

11 (2) each person holding a recorded interest in
12 the real property subject to the environmental covenant;

13 (3) each person in possession of the real
14 property subject to the environmental covenant;

15 (4) the agency;

16 (5) the state engineer, if the covenant
17 indicates that ground water is contaminated or that residual
18 contamination of ground water may be present;

19 (6) all owners of property adjoining the
20 property subject to the environmental covenant;

21 (7) each municipality or other unit of local
22 government in which real property subject to the environmental
23 covenant is located; and

24 (8) any other person the agency requires.

25 B. The validity of an environmental covenant is not

1 affected by failure to provide a copy of the environmental
2 covenant as required under this section.

3 Section 8. ENVIRONMENTAL COVENANT THAT PROHIBITS
4 UNRESTRICTED USE OF REAL PROPERTY--NOTICE--RIGHT OF
5 RESCISSION.--

6 A. An owner of real property subject to an
7 environmental covenant that prohibits the unrestricted use of
8 the property shall provide to the purchaser, lessee or other
9 person acquiring an interest in the property:

10 (1) a recorded copy of the environmental
11 covenant;

12 (2) written notice that the person has the
13 right to rescind the conveyance within ten business days after
14 receiving the notice required by this subsection; and

15 (3) written notice that an owner of real
16 property subject to an environmental covenant that prohibits
17 the unrestricted use of the property is subject to civil and
18 criminal penalties pursuant to the Uniform Environmental
19 Covenants Act for failing to comply with the provisions of this
20 section.

21 B. A purchaser, lessee or other person acquiring an
22 interest in real property subject to an environmental covenant
23 that prohibits the unrestricted use of the property shall have
24 the right to rescind the conveyance within ten business days
25 after receiving the required copy of the environmental covenant

.167431.1

1 and the notice from the owner pursuant to Subsection A of this
2 section.

3 C. An environmental covenant that prohibits the
4 unrestricted use of the property shall explicitly contain, in
5 addition to the requirements of Section 4 of the Uniform
6 Environmental Covenants Act, a description of the possible
7 penalties and of the right of rescission and notice
8 requirements provided in this section.

9 Section 9. RECORDING.--

10 A. An environmental covenant and any amendment or
11 termination of the environmental covenant shall be recorded in
12 every county in which any portion of the real property subject
13 to the environmental covenant is located. For purposes of
14 indexing, a holder shall be treated as a grantee.

15 B. Except as otherwise provided in Subsection C of
16 Section 10 of the Uniform Environmental Covenants Act, an
17 environmental covenant is subject to the laws of New Mexico
18 governing recording and priority of interests in real property.

19 Section 10. DURATION--AMENDMENT BY COURT ACTION.--

20 A. An environmental covenant is perpetual unless it
21 is:

22 (1) by its terms, limited to a specific
23 duration or terminated by the occurrence of a specific event;

24 (2) terminated by consent pursuant to Section
25 11 of the Uniform Environmental Covenants Act;

.167431.1

1 (3) terminated pursuant to Subsection B of
2 this section;

3 (4) terminated by foreclosure of an interest
4 that has priority over the environmental covenant; or

5 (5) terminated or modified in an eminent
6 domain proceeding, but only if:

7 (a) the agency that signed the
8 environmental covenant is a party to the proceeding;

9 (b) all persons identified in
10 Subsections A and B of Section 11 of the Uniform Environmental
11 Covenants Act are given notice of the pendency of the
12 proceeding; and

13 (c) the court determines, after hearing,
14 that the termination or modification will not adversely affect
15 human health or the environment.

16 B. If the agency that signed an environmental
17 covenant has determined that the intended benefits of the
18 environmental covenant can no longer be realized, a court,
19 under the doctrine of changed circumstances, in an action in
20 which all persons identified in Subsections A and B of Section
21 11 of the Uniform Environmental Covenants Act have been given
22 notice, may terminate the environmental covenant or reduce its
23 burden on the real property subject to the environmental
24 covenant. The agency's determination or its failure to make a
25 determination upon request is subject to review pursuant to the

.167431.1

1 Administrative Procedures Act.

2 C. Except as otherwise provided in Subsections A
3 and B of this section, an environmental covenant may not be
4 extinguished, limited or impaired through issuance of a tax
5 deed, foreclosure of a tax lien or application of the doctrine
6 of adverse possession, prescription, abandonment, waiver, lack
7 of enforcement, acquiescence or a similar doctrine.

8 Section 11. AMENDMENT OR TERMINATION BY CONSENT.--

9 A. An environmental covenant may be amended or
10 terminated by consent only if the amendment or termination is
11 signed by:

12 (1) the agency;

13 (2) the current owner of the fee simple of the
14 real property subject to the environmental covenant, unless
15 waived by the agency;

16 (3) each person who originally signed the
17 environmental covenant, unless the person waived in a signed
18 record the right to consent or a court finds that the person no
19 longer exists or cannot be located or identified with the
20 exercise of reasonable diligence; and

21 (4) the holder, except as otherwise provided
22 in Paragraph (2) of Subsection D of this section.

23 B. If an interest in real property is subject to an
24 environmental covenant, the interest is not affected by an
25 amendment of the environmental covenant unless the current

.167431.1

1 owner of the interest consents to the amendment or has waived
2 in a signed record the right to consent to amendments.

3 C. Except for an assignment undertaken pursuant to
4 a governmental reorganization, assignment of an environmental
5 covenant to a new holder is an amendment.

6 D. Except as otherwise provided in an environmental
7 covenant:

8 (1) a holder may not assign its interest
9 without consent of the other parties;

10 (2) a holder may be removed and replaced by
11 agreement of the other parties specified in Subsection A of
12 this section; and

13 (3) a court of competent jurisdiction may fill
14 a vacancy in the position of holder.

15 Section 12. ENFORCEMENT OF ENVIRONMENTAL COVENANT.--

16 A. A civil action for injunctive or other equitable
17 relief for violation of an environmental covenant may be
18 maintained by:

19 (1) a party to the environmental covenant;

20 (2) the agency;

21 (3) if the agency is not a state agency, the
22 department of environment;

23 (4) any person to whom the environmental
24 covenant expressly grants power to enforce;

25 (5) a person whose interest in the real

.167431.1

underscored material = new
[bracketed material] = delete

1 property or whose collateral or liability may be affected by
2 the alleged violation of the environmental covenant; or

3 (6) a municipality or other unit of local
4 government in which the real property subject to the
5 environmental covenant is located.

6 B. The Uniform Environmental Covenants Act does not
7 limit the regulatory authority of the agency or, if the agency
8 is not a state agency, the department of environment under law
9 other than the Uniform Environmental Covenants Act with respect
10 to an environmental response project.

11 C. A person is not responsible for or subject to
12 liability for environmental remediation solely because that
13 person has the right to enforce an environmental covenant.

14 Section 13. CIVIL PENALTY.--

15 A. Whenever on the basis of any information the
16 secretary of environment determines that an owner has failed to
17 comply with the provisions of Section 8 of the Uniform
18 Environmental Covenants Act regarding notice and right of
19 rescission requirements for environmental covenants that
20 prohibit the unrestricted use of real property, the secretary
21 shall issue an order imposing on the owner a civil penalty not
22 to exceed five thousand dollars (\$5,000) for each day during
23 any portion of which a violation occurs. The amount shall be
24 deposited in the state treasury and credited to the hazardous
25 waste emergency fund.

.167431.1

1 B. An order issued pursuant to Subsection A of this
2 section shall become final unless, no later than thirty days
3 after the order is served, the owner named in the order submits
4 a written request to the secretary for a public hearing. Upon
5 that request, the secretary shall promptly conduct a public
6 hearing. The secretary shall appoint an independent hearing
7 officer to preside over the public hearing. The hearing
8 officer shall make and preserve a complete record of the
9 proceedings and shall forward recommendations based on the
10 record to the secretary, who shall make the final decision. In
11 connection with a hearing under this section, the secretary may
12 issue subpoenas for the attendance and testimony of witnesses
13 and the production of relevant papers, books and documents and
14 may promulgate rules for discovery procedures.

15 Section 14. JUDICIAL REVIEW.--

16 A. A person who is or may be affected by any final
17 administrative action of the secretary of environment may
18 appeal to the court of appeals for further relief within thirty
19 days after the action. All appeals shall be upon the record
20 before the secretary.

21 B. For appeals of rules, the date of the action
22 shall be the date of filing of the rule pursuant to the State
23 Rules Act.

24 C. Upon appeal, the court of appeals shall set
25 aside the action only if it is found to be:

.167431.1

1 (1) arbitrary, capricious or an abuse of
2 discretion;

3 (2) not supported by substantial evidence in
4 the record; or

5 (3) otherwise not in accordance with law.

6 D. A stay of enforcement of the action being
7 appealed may be granted after hearing and upon good cause
8 shown:

9 (1) by the secretary; or

10 (2) by the court of appeals if the secretary
11 denies a stay or fails to act upon an application for a stay
12 within sixty days after receipt of the application.

13 Section 15. CRIMINAL PENALTY.--An owner who knowingly
14 violates the provisions of Section 8 of the Uniform
15 Environmental Covenants Act regarding notice and right of
16 rescission requirements for environmental covenants that
17 prohibit the unrestricted use of real property is guilty of a
18 fourth degree felony and upon conviction shall be sentenced
19 pursuant to the provisions of Section 31-18-15 NMSA 1978.

20 Section 16. REGISTRY--SUBSTITUTE NOTICE.--

21 A. The department of environment shall establish
22 and maintain a registry that contains all environmental
23 covenants and any amendment or termination of those covenants.
24 The registry may also contain any other information concerning
25 environmental covenants and the real property subject to them

.167431.1

1 that the department of environment considers appropriate. The
2 registry is a public record.

3 B. After an environmental covenant or an amendment
4 or termination of a covenant is filed in the registry
5 established pursuant to Subsection A of this section, a notice
6 of the covenant, amendment or termination that complies with
7 this section may be recorded in the land records in lieu of
8 recording the entire covenant. Any such notice shall contain
9 the following:

10 (1) a legally sufficient description and any
11 available street address of the real property subject to the
12 covenant;

13 (2) the name of the owner of the fee simple
14 interest in the real property, the agency and the holder if
15 other than the agency;

16 (3) a statement that the covenant, amendment
17 or termination is available in the registry at the department
18 of environment and that discloses the method of any electronic
19 access; and

20 (4) a statement that the notice is
21 notification of an environmental covenant executed pursuant to
22 the Uniform Environmental Covenants Act.

23 C. A statement in substantially the following form,
24 executed with the same formalities as a deed in this state,
25 satisfies the requirements of Subsection B of this section:

.167431.1

1 "1. This notice is filed in the land records of the
2 county in which the real property is located pursuant to
3 Section 12 of the Uniform Environmental Covenants Act.

4 2. This notice and the covenant, amendment or termination
5 to which it refers may impose significant obligations with
6 respect to the real property described below.

7 3. A legal description of the real property is attached
8 as Exhibit A to this notice. The address of the real property
9 that is subject to the environmental covenant is [insert
10 address of real property][not available].

11 4. The name and address of the owner of the fee simple
12 interest in the real property on the date of this notice is
13 [insert name of current owner of the real property].

14 5. The environmental covenant, amendment or termination
15 was signed by [insert name and address of agency].

16 6. The environmental covenant, amendment or termination
17 was filed in the registry on [insert date of filing].

18 7. The full text of the environmental covenant, amendment
19 or termination and any other information required by the agency
20 is on file and available for inspection and copying in the
21 registry maintained for that purpose by the department of
22 environment at [insert address and room of building in which
23 the registry is maintained]. The environmental covenant,
24 amendment or termination may be found electronically at [insert
25 web address for covenant]."

.167431.1

1 Section 17. UNIFORMITY OF APPLICATION AND CONSTRUCTION.--
2 In applying and construing the Uniform Environmental Covenants
3 Act, consideration shall be given to the need to promote
4 uniformity of the law with respect to its subject matter in
5 states that enact it.

6 Section 18. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL
7 AND NATIONAL COMMERCE ACT.--The Uniform Environmental Covenants
8 Act modifies, limits or supersedes the federal Electronic
9 Signatures in Global and National Commerce Act but does not
10 modify, limit or supersede 15 USCA Section 7001(a) or authorize
11 electronic delivery of any of the notices described in 15 USCA
12 Section 7003(b).

13 Section 19. SAVING CLAUSE.--The Uniform Environmental
14 Covenants Act does not affect an action commenced, proceeding
15 brought or right accrued before the effective date of that act.

16 Section 20. SEVERABILITY.--If any part or application of
17 the Uniform Environmental Covenants Act is held invalid, the
18 remainder or its application to other situations or persons
19 shall not be affected.

20 Section 21. APPLICABILITY.--The provisions of the Uniform
21 Environmental Covenants Act apply to environmental covenants
22 arising before or after the effective date of that act, but
23 shall not apply to lands held in trust by the state pursuant to
24 the act of congress of June 20, 1910, entitled "An act to
25 enable the people of New Mexico to form a constitution and

.167431.1

1 state government and be admitted into the union on an equal
2 footing with the original states".

3 Section 22. EFFECTIVE DATE.--The effective date of the
4 provisions of this act is July 1, 2007.

5 - 22 -
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

underscored material = new
~~[bracketed material]~~ = delete